IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 142 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME-TAX - Applicant(s)

Versus

D N DOSANI - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant
NOTICE SERVED for Respondent
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 05/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1.The Income Tax Appellate Tribunal, Ahmedabad Bench “B” has referred the following questions under Section 256(1) of the Income Tax Act, 1956 (the Act), both at the instance of the revenue and the assessee.

> “[1] <u>On department's request for each of the assessment years 1979-80 to 1983-84</u> :
>
> Whether, on the facts and circumstances of the case, the Tribunal was right in law in holding that in the fresh assessment order passed in pursuance of order of the learned Commissioner u/s 263 of the Income Tax Act, 1961, the Income Tax Officer was entitled to consider only those two items which were considered by the learned Commissioner and was not entitled to consider afresh any other item for making addition ?
>
> [2] <u>On assessee's request for assessment year 1983-84 only</u> :
>
> Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee was not entitled for deduction of the entire cost of films in the year of payment?”

2.The assessment years are 1979-80 to 1983-84 and the relevant accounting periods are Samvat Years 2034 to 2038. The assessee, an individual carries on proprietary business of exhibition of 16 m.m. Films on non-commercial basis in the name and style of Saurashtra Film Library. He also carries on business of manufacturing and sale of projector spare-parts in the name of Saurashtra Cine Traders. On 16th January 1987, the Commissioner of Income Tax (CIT) issued notice under Section 263 of the Act and it was stated in the show cause notice :

> “I have called for and examined the above mentioned Assessment Order vis a vis the case records and other materials in your case and I am of the view that all these assessment orders are erroneous and prejudicial to the interest of revenue due to the following reasons:
>
> [1] The total investment in the films including cost of extra prints were not considered properly by the Income Tax Officer.
>
> [2] Write off of the cost of the films has been wrongly allowed in the assessments, apparently in terms of Rule

> 9B though the I.A.C. had first instructed under Section 144A that you are only an exhibitor and that the write off should be on pro-rata basis. As you are neither a producer nor you have acquired the rights of exhibition from a producer by paying consideration to him, your case would neither come under rule 9A nor under 9B of Income Tax Rules 1962."

3. After hearing the assessee, he passed an order on 19/2/1987 and the operative part of the order under Section 263 of the Act reads as under:

> "7. The assessments under review are, therefore, set-aside with a direction to the ITO to look into the above mentioned aspects and re-do the assessments as per law and keeping in view the directions given here ITO will also take the necessary consequential actions as the case may be."

4. The assessing officer framed fresh assessments by orders dated 30/3/1988 under Section 144 of the Act as a consequence of the direction contained in the consolidated order under Section 263 of the Act of the CIT. In the said assessments, the assessing officer

made additions and disallowances beyond the aforesaid two issues which were taken up in revisional proceedings by the CIT. The assessee carried the matter in appeal, but the CIT (Appeals) confirmed the assessment orders.

5. The assessee, therefore, preferred second appeals before the Tribunal. A preliminary issue was raised that, as the consolidated order under section 263 dated 19/2/1987 had envisaged only two points for further processing by the assessing officer, the assessing officer could not have considered other aspects for the first time in the fresh assessments dated 30/3/1988 which were consequential to revisional proceedings. The Tribunal vide its order dated 17/9/1992 upheld the preliminary objection. It is recorded by Tribunal that the reliance on behalf of the revenue on the operative portion appearing in paragraph No.7 of the order of CIT, was misplaced and the said observations / directions should not be read out of context. That when the notice and the order under Section 263 of the Act are read as a whole, they clearly envisaged only two points and therefore, a specific mention in the operative part of the order directing the assessing officer to look into the above mentioned aspects and to

re-do the assessments keeping in view the direction given, made it clear that, in effect, the assessments were not set aside in entirety. The Tribunal, therefore, held that the assessing officer travelled beyond his jurisdiction while framing the fresh assessments as he had acquired jurisdiction to look into only those two aspects and nothing else in pursuance of the order under section 263 of the Act.

6. Mr.Manish R.Bhatt, the learned senior standing counsel appearing on behalf of the applicant revenue submitted that the aforesaid findings of the Tribunal are not borne out from a plain reading of the order made by CIT under Section 263 of the Act as well as in law. It was submitted that CIT had categorically observed in paragraph No.7 of his order that the assessments under review are, therefore, set aside and the assessing officer was also permitted to take necessary consequential actions, as the case may be. Therefore, the entire assessment having been set aside, it was open to the assessing officer to consider all items for the purposes of assessment even if the items were not figuring in the order made by CIT. According to him, the assessing officer, while passing fresh assessments, was exercising powers under Section 143(3) of the Act

or Section 144 of the Act, and in the circumstances, was entitled to make additions / disallowances in accordance with law. In other words, the assessing officer could also process the items which were not forming part of section 263 proceedings. In support of the submissions made by him, he has placed reliance on the decision of Madras High Court in case of Commissioner of Income Tax v. Geo Industries and Insecticides (I) Pvt. Ltd., [1998] 234 ITR 541.

7. Though served, there is no appearance on behalf of the assessee.

8. Section 263 of the Act, as is relevant for the present, reads as under :

> “**Revision of orders prejudicial to revenue**.
>
> 263. (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made

> such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

9. A bare perusal of the aforesaid provision makes it clear that, before the CIT can pass any order, he has to give the assessee an opportunity of being heard and thereafter record, at least prima facie, that the order made by the assessing officer is erroneous insofar as it is prejudicial to the interests of the revenue. The requirement of giving the assessee an opportunity of hearing is, for the simple reason that the assessee may be able to refute the belief of the CIT, which might have been formed on examination of the record of any proceeding under the Act, that is to say, assessee may be in a position to point out that the assessment order is neither erroneous nor prejudicial to the interests of the revenue, or even if it is erroneous, it is not prejudicial to the interests of the revenue, or it may not be erroneous, even if it is prejudicial to the interests of the revenue. Therefore, the moment the revenue's contention is accepted that in the fresh assessment, the assessing officer is entitled to examine items which did not form part of section 263

proceedings, the statutory requirement of framing an order under section 263 of the Act after giving the assessee an opportunity of being heard, stands obliterated or is made redundant. This interpretation goes against clear unambiguous language in which the section is couched.

10. The provision also requires the CIT to record that an order passed by the assessing officer is erroneous and prejudicial to the interests of the revenue. The satisfaction of these two pre-requisite conditions is a must before assumption of the jurisdiction under section 263 of the Act. This legal position is well established and bears no repetition. Hence, the CIT can exercise jurisdiction only after establishing on record that the assessment order is erroneous and prejudicial to the interests of the revenue and for this purpose, he has to show from the record as to what portion of the assessment order is erroneous and prejudicial to the interests of the revenue. In a given case, the entire order may be erroneous and prejudicial to the interests of the revenue, but the record of section 263 proceedings must reflect that. In the instant case, and it is not disputed, the CIT has issued show cause notice only on two grounds, and

those are the only grounds processed by the CIT while framing the order under Section 263 of the Act. The operative portion of the order, therefore, cannot be read, as submitted by the revenue *de hors* the contents of the show cause notice and the order.

11. Considering the issue from a slightly different angle. The assessee was called upon by CIT to tender explanation qua two items mentioned in the show cause notice. On a plain reading of section 263(1) of the Act, it is apparent that the CIT could not have treated any further item or part of the assessment order as being erroneous and prejudicial to the interests of the revenue without giving the assessee an opportunity of being heard. Therefore, what the CIT himself could not have done, cannot be permitted to be done by the assessing officer while giving effect to the order under section 263 of the Act. It is necessary to bear in mind that powers of revision can be exercised only by the CIT and therefore, the assessing officer cannot, under the guise of framing fresh assessment, exercise the said powers in relation to other items forming part of the assessment record. The provision which permits exercise of jurisdiction under section 263 of the Act in the first instance requires the CIT to call for and

examine the record of any proceeding under the Act. The logical presumption is, therefore, that before issuance of show cause notice under section 263 of the Act, the CIT has examined the record, and found prima facie that the assessment order is erroneous and prejudicial to the interests of the revenue only in relation to the items mentioned in the show cause notice. For the assessing officer, to substitute his opinion in place of the opinion of CIT is not envisaged by the provision and therefore also, action of the assessing officer in expanding scope of consequential assessments cannot be upheld.

12. The Scheme of the Act has provided different powers to different authorities and these are required to be exercised after satisfying the pre-requisite conditions and jurisdictional facts. The assessing officer can disturb / re-open a finalized assessment by invoking his powers either under Section 154 or under Section 147 of the Act, provided he can show that the necessary requirements are fulfilled. If, what revenue contends today, is accepted, these and other such provisions which empower different authorities to exercise jurisdiction at different point of time in distinct settings would be rendered otiose and that can never be

the legislative intent. It is almost akin to providing separate keys for separate locked doors and the person wanting to open a particular door is required to apply the correct key which matches the concerned lock. Therefore, in proceedings, to give effect to order under Section 263 of the Act, the assessing officer cannot be permitted to undertake an exercise not warranted by the legislative scheme.

13. The Tribunal was, therefore, right in holding that the operative part of the order under section 263 of the Act has to be read in context of what had preceded, namely, the discussion in the revisional order, and both the notice and the order under section 263 of the Act, have to be read as a whole. That the direction to the assessing officer to re-do the assessments is after looking into the aspects discussed by the CIT in his order and the directions made in the body of the order. The sentence recorded in paragraph No.7 of the revisional order cannot be read in isolation, nor can it be read by omitting certain portion of the sentence so as to mean that the assessing officer was entitled to process further items while giving effect to the order under Section 263 of the Act. The Tribunal was, therefore, justified in holding that the assessing

officer had travelled beyond his jurisdiction.

14. The decision in case of CIT v. Geo Industries and Insecticides (I) Pvt. Ltd. (supra) is not an authority for the proposition that the revenue is canvassing in the present case. In fact, the observations made by the Hon'ble High Court of Madras at pages 545 accord with the view that this Court has expressed. What is stated thereafter does not appear to be a correct expression of the legal position and this Court is in respectful disagreement with the opinion expressed by the Hon'ble High Court of Madras.

15. Thus, on the facts and circumstances of the case, the Tribunal was right in law in holding that, in the fresh assessment orders passed in pursuance of consolidated order under section 263 of the Act, the assessing officer was entitled to consider only those two items which had been considered by the CIT and was not entitled to consider any other item afresh for making additions. The question referred at the instance of the Commissioner is, therefore, answered in the affirmative i.e. in favour of the assessee and against the revenue.

16. Insofar as question referred at the instance of the assessee is concerned, the same is left unanswered for want of prosecution in absence of the assessee at the hearing.

17. The Reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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